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Supreme Court U.S.
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No. 02-3

In the Supreme Court of the United States

Randall "Tex" Cobb,

Petitioner,

v.

Time, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. Introduction

Respondent SI[1] evades both essential facts and the law in an effort to belittle the significance of this case and the question it presents. It is untrue that the Sixth Circuit and SI rely only on "undisputed" facts, thereby rendering deference to the jury a superfluous step of appellate analysis. The nature and meaning of Hazelton's testimony, of the isolated phrases SI lifts from context, are clearly disputed. Similarly, whether the journalists' concluded from a review of the tape that Cobb participated in the fix -- or whether they even so testified -- is disputed.[2]

The Sixth Circuit decided an important federal question contrary to *Bose v. Consumers Union*, 466 U.S. 485 (1984) and *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), exemplifying a deeper conflict between independent review as commonly practiced and the Seventh Amendment as interpreted in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Like most courts conducting an independent review of a jury's actual malice finding, it failed to defer to the jury in any way whatsoever. The mass of evidence -- both case law and commentary -- confirms that the *Harte-Hanks* deference standard has spawned wholesale confusion. As a result, appellate rulings consistently run afoul of the Reexamination Clause. SI's tact of ignoring Petitioner's "20 pages of other

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[1] Cobb continues to use the abbreviations used in his Petition. Additionally, "Opp." refers to Respondent's Brief in Opposition and "Pet." to the Petition.

[2] Furthermore, many of the facts in the Opposition, such as the telephone exchange between Cobb and Steptoe, are also disputed.

rulings surveyed" (Opp. at 16) hardly eliminates this phenomenon.

II. SI Mischaracterizes The Underlying Facts In An Effort To Dodge The Question Presented.

The Sixth Circuit Opinion never stated that it was relying only on undisputed facts and that a principled application of the *Harte-Hanks* standard of deference was therefore unnecessary. These *ex post* conclusions represent SI's effort to shore up an opinion that omits a step mandated by the Seventh Amendment and *Gasperini* as well as by the First Amendment jurisprudence of *Bose* and *Harte-Hanks*.[3]

The key facts pertinent to this Petition are, and were, disputed and Constitutionally reserved for jury determination. Hazelton did not, in reality, corroborate Cobb's participation in a fix, and SI so admitted at trial. Pet. n. 5 at 5-7. Indeed, that SI admitted before the jury that Hazelton did not, and could not, corroborate the falsehood that Cobb participated in the fix is undisputed. *Id.* Nevertheless, the Sixth Circuit rested its opinion on the idea of Hazelton's corroboration. It offered this oddly qualified conclusion: "While not stating, in so many words, that Cobb was knowingly participating in the fix, Hazelton provided powerful corroboration of Barch's story." Pet. App. at 21a. This statement typifies the unprincipled overreaching of the Sixth Circuit and most courts conducting an independent review -- the deliberate

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[3] What the Sixth Circuit did contend -- incorrectly -- is that undisputed facts distinguish the case from *Harte-Hanks* and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Pet. App. at 21a

disregard of testimony before the jury and the court's rationalization of a conclusion contrary to the jury's. SI fails to rescue the idea of Hazelton's "corroboration" by its semantic adjustment -- its revelation that Hazelton was *really* providing an "expert assessment" that Barch "had told the truth" to Hazelton and Steptoe. Opp. at 18. Whether it is the word "story" or "truth" that is expected to encompass the unconfirmed defamatory statement that Cobb participated in the fix, the fallacy remains. The conclusion that Hazelton corroborated some determinative or influential piece of the defamation is precluded by the broader, pertinent admission that he did not corroborate that Cobb was part of the fix. No amount of equivocation, whether one plays with "story" or "truth" or some new tag, can reverse the legal impact of the admission. As a matter of law, the Sixth Circuit was obligated to conclude, as the jury must have found, that Hazelton did not provide SI with corroboration of the falsehood.[4]

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[4] The notion that confirming that the fight was fixed confirms Cobb's participation in fight fixing hardly merits consideration. The one proposition, quite simply, does not confirm the other. To conclude otherwise begs the question central to the trial. Both the District Court and jury were fully conscious of the premise underlying the trial that the assertion that the fight was fixed is not the equivalent of the defamatory statement that Cobb committed the crime of fight fixing. To assume an equivalence, as the Sixth Circuit and SI now tend to do, itself smacks of a reckless disregard for truth; it is the same sort of thoughtless leap that justifies a $10.7 million judgment.

Perhaps more importantly, SI admitted to the jury that corroboration that the fight was fixed does not serve to corroborate the false, defamatory statement. Pet. n. 5 at 5-7. As a matter of law, then, the Sixth Circuit was barred from finding otherwise and

SI continues to impose non-existent meanings on Hazelton's testimony by lifting isolated phrases from the transcript and placing them in an entirely different, self-serving context, the same error the Sixth Circuit copied from SI's briefs below. Cobb already noted that Hazelton's statement that the fight film "bears out everything that was said" did not, in context, implicate *Cobb*. Pet. n. 6 at 7; App. at 1555-1556. In fact, the focus of this testimony was *Barch* throwing the match. *Id.* Yet SI, like the Sixth Circuit, continues to burden the phrase with unintended meaning. Opp. at 6,17.

The phrase that Hazelton "thought the information received from Barch was accurate," which SI repeatedly cites and the Sixth Circuit echoed, is no different. *Id.* When Hazelton used the phrase in testimony, he was speaking very generally about the undisputed fact that the fight was fixed. He said: "*I thought the fight was arranged and* I thought that the information I received from Barch was accurate." App. at 1546-1547 [emphasis supplied]. Even the larger context surrounding that sentence included *nothing* about the idea of Cobb's participation, which SI's trial counsel was free to explore at any time. *Id.* Principled deference to a jury is needed to prevent just such falsifying manipulations of a cold, paper record.

But more significantly perhaps, to the extent there *is* a contradiction between SI's trial admissions that Hazelton did not provide corroboration and the meanings SI now hopes to tease from snippets of the record, the jury must have believed the admissions. And, again, the Sixth Circuit was obligated to defer to the jury's belief.

SI's arguments to this Court to that effect are vain.

The outcome of the journalists' review of the tape is also disputed. The jury must have concluded that the journalists' review did nothing to confirm their false preconception that Cobb participated in the fix. Pet. at 7-8. First, the reporters' own *ex post* testimony falls short of establishing that the tape offered them confirmation. Steptoe said that she merely "wondered if" Cobb was "putting 100 percent effort" into the fight but did not reach a contrary conclusion. App. at 956. Indeed, she noticed that Cobb was throwing truly committed punches. *Id.* She later said it looked like the fighters "were acting" but this was "not a firm conclusion." App. at 978. Nack simply said that Barch "went in the tank." App. at 1290. Guard said the tape "jibed." App. at 1353.

But even if the testimony were as SI represents, the jury simultaneously both watched the tape and heard the journalists' testimony, observing their demeanor. Pet. at 7-8. The jurors also viewed the tape themselves and heard Cobb's expert testify that the tape did not show that Cobb participated in a fix. *Id.* Based on this, the jury must have rejected that the journalists could have drawn from the tape the confirmation SI now advances. Contrary to SI, there is no confusion here between falsity and state of mind. The jury, at most, made a typical credibility determination.

Such facts bearing on corroboration are significant because SI purposefully avoided the truth. Not one reporter dared ask the only question pertinent to the defamatory statement -- whether Cobb fixed the fight. Such facts are also important because SI relied solely on an unreliable source whom it had serious reasons to doubt. Both failings establish

actual malice.[5] *Butts*; *Harte-Hanks*; *St. Amant v. Thompson*, 390 U.S. 727 (1960).

III. The Question Presented Requires Review.

The question demands review because the present standard, applied by courts conducting an independent appellate review, is deeply flawed and mired in disarray. As a result, most courts, like the Sixth Circuit here, abandon any standard of deference -- even if they acknowledge the existence of a general principle -- and engage in a wholesale redetermination of the facts. Decisions, like the Sixth

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[5] There are many other disputed facts that SI declares are undipsuted. For example, when Steptoe spoke to Cobb, she did not, in fact, offer to meet him in Nashville and did not even seek an interview. Trial Transcript 609. Indeed, Nack was already, at that moment, completing the final draft of the article, due for publication in less than 24 hours under SI's self-imposed ten-day deadline, even though it was not "hot news." App. at 1261-1262.

Perhaps even more importantly, Cobb would have had no reason to offer Steptoe the name of Neely Owens or anyone else who knew his whereabouts during the day when, according to Barch's false accusation, Cobb was supposedly conspiring with Barch on how to choreograph the fight. For Steptoe never confronted Cobb with the story about a conversation occurring in Barch's hotel room. App. at 1063-1064; Trial Transcript at 609. Surely, it is not the duty of an about-to-be defamed plaintiff, who lacks key information about the imminent defamation, to supervise professional journalists in avoiding purposeful avoidance.

The repeated idea that these experienced investigators could disprove the defamation only from their interviews with either Cobb or Barch is a pathetic rationalization for avoiding an adequate investigation. See Pet. at 8.

Circuit's, conflict not only with this Court's rulings in *Bose* and *Harte-Hanks* but with the Seventh Amendment and this Court's holding in *Gasperini*. As the Petition demonstrated with both the empirical evidence of court decisions and courts' and commentators' candid observations, the nation's appellate courts are at a loss on how to proceed with independent review. To disparage and then ignore this evidence and commentary refutes nothing.

SI's attempt to discount the question presented as a mere quarrel over "methodology" is a misleading play on words. Opp. at 12. At bottom, what SI dismisses as a conflict over empty terminology is nothing less than the serious conflict that moved this Court to accept review in *Harte-Hanks* in the first place, a conflict that *Harte-Hanks* not only failed to resolve but actually exacerbated. Certainly Justice Scalia and the other Justices of this Court who expressed approval of his views did not see the matter in such trivial terms. See Pet. 9-11, 23-26.

SI's predicate distinction between a "standard" and a "method" is false because a standard exists only through its application. Opp. at 12. Understanding *how* to defer to a jury is a precondition to deferring. The problem with independent appellate review, discussed in the Petition, is that the concept of deference, if appellate courts even mention it, is never activated.[6] Courts do nothing with it, and the law has reverted to a state more indefinite, ambiguous, and dangerous

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[6] Many courts perfunctorily acknowledge the idea but do not apply it. Some courts never mention deference. A few struggle with the application of a standard, but even these are split between a "reasonable jury"/ "may have" standard and something akin to a "must have" standard. Pet. at 15-20.

than what gave rise to this Court accepting certiorari in *Harte-Hanks*. The problem is not simply that the Sixth Circuit followed no *articulated* method but also that it followed *no* method.

The problem is indeed Constitutional and has nothing to do, as SI suggests, with an imagined risk of prolixity in judicial opinions. *Gasperini* explicitly provided that the final, minimum safeguard, the last protective bulwark, for the Reexamination Clause at the appellate level is a highly deferential standard of review. Moreover, the Reexamination Clause is aimed particularly at appellate review. For a court to note but not apply the clearly erroneous standard has become a mechanism for violating, not protecting, the Seventh Amendment. It is all too easy, and too common a practice, to refer in passing to the general idea of deference but then exceed the appellate function and invade the province of the jury.[7] Indeed, briefly reciting a general concept but not applying the principle has become a convenient means of disguising or excusing an avoidance of principle. Media defense attorneys know full well the status of the law:

> Appellate judges are divine people. If they become convinced that the speech you are defending is worthy of constitutional protection, they will have no trouble in exercising their divine right and intruding into

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[7] See Libel Defense Research Center statistics verifying the truly phenomenal percentage of actual malice reversals at Pet. at 20-21.

> the province of the jury under the guise of independent review.[8]

SI, completely ignoring the Seventh Amendment, hopes to perpetuate this imbalanced regime.[9]

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[8] Libel Defense Research Center, *Ten Years of Appellate Review in Defamation Cases from* Bose *to* Connaughton *to the Present*, LDRC Bulletin No. 2 (Apr. 1994) at 26.

[9] The facts of this case are ideal for correcting the appellate excess the above-quoted media defense lawyer smugly acknowledged. SI was completely successful before the Sixth Circuit in its effort to sully Cobb for having fought in a fixed fight. It is clear from the Opinion that the Sixth Circuit felt the speech was "worthy of constitutional protection," to borrow the quoted lawyer's phrase, because Cobb was caught in the middle of such a shoddy affair. Thus, the distinction between confirming that a fight was fixed and confirming that the victor committed the crime of fight fixing, central to the District Court proceeding and jury verdict, provides the opportunity to keenly illuminate how deference to the jury under the Seventh Amendment serves as a check on a reviewing court's undisciplined over-reaction to the facts.

RESPECTFULLY SUBMITTED,

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